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THE SLIPPERY DISCOURSE OF SEXUAL CONSENT: FEMINIST ACUMEN AND FEMINIST EXCESS

Dan Subotnik*

“The ‘Patriarchy’ did not rape me . . . One man did.”

Wendy McElroy¹

“I no longer think about whether I *should* be offended. Instead, I . . .
know that I *am* offended [and t]he result is a feeling of wholeness.”

Catherine Wells²

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¹ WENDY McELROY, RAPE CULTURE HYSTERIA: FIXING THE DAMAGE DONE TO MEN AND WOMEN 6 (2016).

² Catherine Wells, *The Theory and Practice of Being Trina: A Remembrance of Trina Grillo*, 81 MINN. L. REV. 1381, 1387 (1997) (emphasis in original). Wells teaches at Boston College Law School. For an early hint of what’s coming, the reader might want to consider: Is it even conceivable that a man had written this about anything?

ABSTRACT

The Kavanaugh confirmation hearings, the Harvey Weinstein case, and the Jeffrey Epstein case have done us a valuable service. By focusing mass media attention and academic discourse on consent to sex and on assault, they have brought to a boil two issues that have been simmering for some time in feminist circles. The present essay invites readers to consider feminist writings over the last half-century that have influenced this discourse and continue to incite febrile talk today.

First to be examined is the American “heartbalm” regime, an early effort to protect women from the emotional harm resulting from seduction by fraud, breach of promise to marry, and similar objectionable behavior, some of which, it has been argued, vitiates consent and should be actionable. We then examine assertions of women’s non-consent that have been used to justify new, heavy regulation: the fundamentality of rape (Susan Brownmiller), “dominance feminism” (Catharine MacKinnon), and related claims of women’s lack of agency (Robin West). These claims are set against rejoinders that women are much more powerful in the sexual realm than as portrayed by the critics, and that, by extension, determinations of legal consent should not be left only to the critics. This will bring us to an evaluation of affirmative consent as a tool for ensuring real agreement.

The essay goes on to highlight the absence of reliable data on campus sexual assault. While stressing the obligation to confront such assault whenever it takes place, this discussion examines the gap between the one-in-five sexual assault data point famously reported by President Obama (i.e., the chances for women to be assaulted during their college years) and the much lower rates recorded in other studies, including so-called university Clery reports. These uncertainties would seem to militate against the stereotyping of college men as brutes, a state of affairs that is perhaps best reflected in the report of four Harvard women law professors detailing what they consider the “shocking” treatment of men in assault investigations.

Focus then shifts to the #MeToo-related claim (Deborah Tuerkheimer) that, no “ifs” or “buts” provided, women should be believed in he said/she said cases. Analogizing rape to robbery—with neither consideration of their contextual difference nor concern

with due process rights of men—this claim seems premised on the idea that no one questions the actual occurrence of a reported robbery.

What follows is an argument against simply believing a woman's assault complaint. Emanating straight from the trenches and provided by an experienced sexual assault investigator and former law school dean (Joan Howarth), this argument underscores the sexual ambivalence and confusion she found over the years in women complainants.

Discussion turns finally to a common feature of much current discourse, one that is exemplified throughout this article: an attitude of self-righteousness made unapologetically manifest in the Wells epigraph above. This arrogance has induced men to step back in assault discussions, which, in turn, has precluded understanding of sexual dynamics, is condescending to women though upholding their primacy, and tends to poison gender relations on campus and elsewhere.

A MAN WITH A PLAN

Is the sexual environment we have created for ourselves a healthy and happy one, or at least close to the best that we can realistically devise? Or, perhaps, is major new regulation required?

These questions have spawned a large academic literature over the years. The #MeToo movement, the Blasey Ford/Kavanaugh, the Epstein, and the Weinstein cases have only increased public interest in women's safety. It seems useful then to review the flow of related works to contextualize the current moment's urgent calls for change. To help deal with the large volume of relevant writings, this essay will often draw on examinations of the literature through my related work surveying the legal academic terrain of consent over the past twenty-five years.

The views to be presented here cannot help but be influenced by my sex. The reader should not be concerned, however, that women's voices will be marginalized. Because women's consent is at the heart of most writing in this area, most opinion drawn on here will be that of women. Men's voices, by contrast, have been discouraged. Attempting to keep female control of discourse, to illustrate, a new book on law school gender climate tries to preempt a male pushback by labeling it in advance as "*mansplaining*, *hepeating*,

and whitesplaining.”³ I have not yielded to this gambit; nevertheless, “Slippery Slope” will be no masculinist romp.

To further allay concerns about my subject position, I stipulate up front: #MeToo has shown in detail the harm wrought by sexual assault, harm that is compounded when authorities fail to investigate and prosecute.⁴ The invasion of the body makes sexual assault nothing less than savagery; no healthy community can tolerate it.

But “power sex” (sex based on male physical and social power), I argue here, makes up only a part of the contemporary story of sexual relations. I further argue that some feminists have been too willing to stereotype men; that many of their public representations of female sexuality are tendentiously unrealistic; that men as a class are not guilty of sexual assault as charged; and that the number of wrongly accused men on college campuses is likely a good bit higher than reported.⁵ In short, the central message of this essay is that while the feminist spotlight on sexual assault has helped build a healthier community, it has at the same time left serious burn marks that need attention. Feminist acumen, that is, coexists with feminist excess.

³ See MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 43 (2019) (lamenting the rhetorical strategies of white men when under attack). For a review of this book, see Dan Subotnik, *Are Law Schools Oppressing Minority Faculty Women? A Critique of Meera E. Deo*, “*Unequal Profession: Race Gender in Legal Academia*” 37 TOURO L. REV. 741 (2021).

⁴ A new article reports that in six American counties a decade ago only one-fifth of sexual assault reports led to an arrest, 1.6% led to trial. See *Her Word Against His*, *ECONOMIST* (Jan. 4, 2020), <https://www.economist.com/international/2020/01/04/why-so-few-rapists-are-convicted>. America’s National Criminal Justice Reference Service conducted a study on six American counties and found that between 2008 and 2012, only one-fifth of sexual assault reports led to an arrest, and only 1.6% of reports led to trial. *Id.*

⁵ See Howarth, *infra* note 106. Men of color may suffer the most harm, being disproportionately accused by alleged victims. See Emily Yoffee, *The Question of Race in Campus Sexual-Assault Cases*, *THE ATL.* (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361>.

BATTLE BASICS

Making the case of feminist bias against men almost thirty years ago, Professor Alan Dershowitz, then in his halcyon days, described a discursive environment that has stifled frank discussion on sexual assault.⁶ “Women. . . are entirely free to attack. . . men in the most offensive of terms. Radical feminists can accuse all men of being rapists . . . without fear of discipline or rebuke.”⁷

Have attacks such as Dershowitz’s been fueled by a political agenda? Say, by a restless antipathy towards men, one born perhaps of frustration with dependence on men,⁸ one that is not limited by national borders and may be captured by a new jeremiad, “I Hate Men.”⁹ If so, toward what specific goal? Energizing women to confront an identified enemy? Strengthening social bonds between women by giving them common cause? Dershowitz did not say. In any event, the stereotyping of men by academics, as we shall see, continues to the present day, and is reflected throughout this essay. If sex itself scrambles the mind (in ways we shall take note of), does writing about sex do the same?¹⁰

Readers might begin considering: (1) to what extent have the critiques been fair?; (2) if men, especially on campus, have allowed themselves to be intimidated in this realm—if when struck they still chivalrously keep their rhetorical swords sheathed—what does this say about “patriarchal” power?; and (3) finally, are there ways in which an undecided male scholar might offer something of value to his female colleagues?

⁶ See Alan Dershowitz, *Harvard Witch Hunt Burns the Incorrect at the Stake*, L.A. TIMES (April 22, 1992) at B7.

⁷ *Id.*

⁸ It seems fair to speculate that men’s hostility to women is tied to the same kind of frustration with dependency.

⁹ PAULINE HARMANGE, *I HATE MEN*, (Natasha Lehrer trans. 2021) (2021). The book, which first appeared in French, is being translated into seventeen languages. See also Laura Cappelle, *With ‘I Hate Men,’ a French Feminist Touches a Nerve*, N.Y. TIMES (Jan. 11, 2020), <https://www.nytimes.com/2021/01/10/books/pauline-harmange-i-hate-men.html>.

¹⁰ See Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L. J. 149, 214 (2000) (“women have a seemingly endless capacity to lie, both to [them]selves and others, about what gives [them] pain and what gives [them] pleasure.”).

My message here can in a sense be reduced to nine words borrowed from author and rape victim Wendy McElroy: “[t]he ‘[p]atriarchy’ did not rape me . . . [a] man did.”¹¹ This message can be usefully juxtaposed with one from well-known feminist law professor, Joan C. Williams. Citing the indebtedness of her own scholarly philosophy to John Dewey’s prioritization of values over logic as a source of truth—a basic anti-foundationalist position—Williams goes on to announce the mission of her book: “[M]y goal,” she announces, “is not to deliver the truth but to inspire social change,” a radically relativist formulation that is not so easily defended.¹² For viewed as a scholarly *raison d’être*, this statement can be reasonably taken to mean that when facing a choice between pursuing truth logically and promoting a self-interested position, Williams would opt for the latter.

From Williams’ statement of her own mission, it seems a fair step to hypothesize that at least some women academics see themselves first as activists, and only then as (dispassionate) scholars.¹³ And probably as a result, at least some of their theorizing about heated matters such as sexual engagement has gone awry, even badly awry. For truth to be objective, it cannot in the end be sacrificed to the fight for social justice, whose meaning is so contentious. And whatever their salubrious side, it should not be hard to imagine that messages like Williams’ which, as we shall see, place the burden of solving women’s problems on men, damages both personal and professional relations between the sexes, a not insignificant part of American economic and social life. Given this possibility, a scholar aiming for objectivity would be wise to read Williams and like-minded writers—a number of whom are discussed in this essay—with strict scrutiny.

Another warning: Frank talk about assault and sexual consent can be unsettling. Would that it were otherwise, but exploring these topics necessitates close concentration on the pathways to sex, something law review readers may not be primed for. That it is a man, a borderline octogenarian at that, who is writing here about the

¹¹ See MCELROY, *supra* note 1, at 6.

¹² JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 244 (2000).

¹³ *Id.*

sexual experience of women one-third his age may be doubly troubling. If as a result a trigger warning is warranted, this is it.

A WHITE LIE?

Consider the following circumstances. Harry meets Hilda at an end-of-semester bash. Inspired by alcohol or drugs both before and during the party, and encouraged by friends, they bond quickly. A little later, Hilda asks Harry whether he is married. He says no. Still later that night they retire to Harry's—or Hilda's—place, disrobe, and have sex. That begins an intense relationship, though Hilda gets a little uneasy because Harry is not available on weekends, claiming to be out of town. A few months later Hilda learns conclusively about Harry's married status, cannot bear to continue the relationship, and brings an action against him for fraud. Might Hilda have a cause of action against Harry?

This scenario came to me in 1994 while reading Professor Jane Larson's intriguing article in the *Columbia Law Review* titled "Women Know So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction."¹⁴ In effect, Larson was reminding readers that in the case of an automobile accident, we take into account not only financial damage to the plaintiff but also the pain and suffering to the victim flowing from the accident.¹⁵ That is, all damage to the victim can be compensated. Even without an accident, for that matter, one can be liable for a lie. If, for example, I tell someone that his mother was just murdered when I know she wasn't, I could be liable for knowingly inflicting emotional harm.¹⁶ None of this will be new to the law-trained reader.

Writing as a "feminist," Larson suggested that the wrong in the Hilda-Harry scenario can be at least as harmful, and *may* be more harmful than, say, the emotional injury resulting from an automobile accident, and thus the matter *should* be justiciable.¹⁷ In essence, there

¹⁴ See Jane Larson, *Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993).

¹⁵ See *id.*

¹⁶ See Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1983).

¹⁷ See Larson, *supra* note 14, at 374.

is no consent to sex, any more than consent to buying a car, when the deal is founded on a lie: e.g., the “car” lacks a carburetor. Surely few will doubt that extensive psychic damage can be wrought by a sexual lie; but did the law need to intervene here on the woman’s behalf? Given the considerable amount of playacting/roleplaying that goes on in intimate relationships, I was intrigued, but dubious, and wrote a long article in rebuttal.¹⁸

Larson’s argument needs context. For at least eighty years, beginning in about the 1850s, the law protected women against such fraud under “heartbalm” rules, which allowed women to bring civil claims against men for seduction, for breach of promise to marry, and for alienation of affection (upsetting the marital relationship thereby).¹⁹ During those times, Hilda could have won her case for seduction if she could have proved misrepresentation, reliance, and emotional damage.

By the late 1930s, a fair part of heartbalm protections had been swept away; Hilda would have no case today.²⁰ Why? One thing has become clear: women were actively engaged in the movement to repeal it.²¹ Is it possible that the elation produced by the successful drive for the franchise led many women to feel that they no longer needed the law to protect them from emotional harm? Certainly, cultural evidence points in this direction: the women idealized in 1930s American films were not weak and timid. They were fast-talking women of the world: consider Katharine Hepburn, Joan Crawford, Bette Davis who wore shoulder pads and saw themselves as giving back as good as they got; they could fend for

¹⁸ See Dan Subotnik, *Sue Me, Sue Me, What Can You Do Me? I Love You: A Disquisition on Law, Sex, and Talk*, 47 FLA. L. REV. 311 (1995). A recent article reports on a study finding that “[m]any people . . . believe that an individual can give consent *even though she was lied to* by the person seeking her consent.” Roseanna Sommers, *You Were Duped Into Saying Yes. Is That Still Consent?*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/opinion/sexual-consent.html>. Sommers teaches law at the University of Michigan. *Id.*

¹⁹ See Larson, *supra* note 14, at 394.

²⁰ For a retrospective on heartbalm regimes and their conclusion, see Tori Telfer, *How the “Heart Balm Racket” Convinced America That Women Were Up to No Good*, SMITHSONIAN MAG. (Feb. 13, 2018), <https://www.smithsonianmag.com/history/how-heart-balm-racket-convinced-america-women-were-no-good-180968144>.

²¹ *Id.* Some women were in the forefront of the anti-heartbalm movement. See Larson, *supra* note 14, at 397 n.93.

themselves perfectly well (at least until the final clinch).²² Women's seeming rejection of heartbalm may also be connected to the flapper-era notion that sex out of wedlock, far from morally tainting, could actually be uplifting. Here again cultural evidence supports this notion: pre-code movies of the late 1920s and 1930s showed many women strikingly unencumbered by puritan mores.²³ By the end of the twentieth century, heartbalm was largely dead.²⁴

If torts teachers raise the issue of heartbalm today, their number is small.²⁵ And yet Larson was not wholly wrong; people do get hurt by lies, sometimes badly. But still it was intriguing that Larson could only barely discern that women tell lies too. Among the most notable of these, one can surmise, "I am not seeing anyone else now"; "I am using birth control"; "No kidding, I am a Methodist too"; and "of course, you are the father of the child—who else could be?" Heartbalm if restored, in other words, would catch both male and female scoundrels in its net.²⁶

Extrapolating from Larson, one might wonder about the current need to see women only as innocent and men only as their tormentors, as opposed to seeing men and women as two groups often struggling, however awkwardly, instinctively, and self destructively at times, to satisfy physical and companionship needs. Furthermore, if women eighty-five years ago acted on the belief that they could look after themselves quite well and no longer needed (if they ever did) to sue men over the predictable sequelae of canoodling

²² See, e.g., Julie Human, *A Woman Rebels? Gender Roles in 1930s Motion Pictures*, 98 REG. OF THE KY. HIST. SOC'Y, 405, 407, 418 (2000).

²³ See, e.g., MICK LASALLE, *COMPLICATED WOMEN: SEX AND POWER IN PRE-CODE HOLLYWOOD* (2000).

²⁴ But not in parts of the world influenced by British law. See Jianlin Chen, *Lying About God (And Love?) To Get Laid: The Case Of Criminalizing Sex Under Religious False Pretense In Hong Kong*, 51 Cornell Int'l L. J. 553 (2018).

²⁵ Subotnik, *supra* note 18. At the time I wrote "Sue Me," I looked hard for contrary evidence. In preparing this article, I again found no references to heartbalm in law texts, though I do not claim to have proved a negative. *Id.*; Sommers, *supra* note 18. In her large empirical study, PhD psychologist and University of Michigan law professor Roseanna Sommers reports that "most" of her interview subjects did not consider Harry to be guilty of rape. *Id.* Sommers does not break down opinion by sex of study subjects. *Id.*

²⁶ Readers who believe that such misstatements of truth are insubstantial should imagine that that they come in response to an explicit and urgent inquiry by the other party.

on the sofa—all this while enjoying only a fraction of the social, economic, and political power they have today, why would they want to resuscitate heartbalm? What new vulnerability did Larson uncover?

AGAINST OUR WILL?

Larson could not help but direct readers' attention back to Susan Brownmiller who, in 1975, initiated the modern conversation about sexual assault with her bestselling "Against Our Will: Men, Women and Rape," spawning a literature that I have spent much of the last two decades assessing.²⁷ Brownmiller starts out in the distant past, first noting the inattention to rape by such canonical figures as Freud and Marx, then hypothesizing the emergence of rape in prehistoric times, proposing that "[W]hen men discovered that they could rape, they proceeded to do it," and ranking "[m]an's discovery that his genitalia could serve as a weapon to generate fear with the discovery of fire."²⁸ Two sentences later she lays down a grand stereotype, dramatically concluding that rape is "nothing more or less than a conscious process of intimidation by which *all men* keep all women in a state of fear."²⁹ The woman reader might want to pause to consider whether she is living her life in a "state of fear?"³⁰

The logical inference a male reader could make from Brownmiller's assertions might well be a self-interrogating syllogism: Through rape, I. all men terrorize; II. I am a man; III. Ergo, I am a terrorist. Certainly, for what it is worth, that was its effect on me. Were my male friends and I stereotypical rape-terrorists? Should I respond to an attack that felt so personal, or would my response be taken as evidence of guilt? In any case, it

²⁷ See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); see Dan Subotnik, "Hands Off": *Sex, Feminism, Affirmative Consent and The Law of Foreplay*, 16 S. CAL. REV. OF L. & SOC. JUST. 249 (2007); see Dan Subotnik, *Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy*, 41 AKRON L. REV. 847 (2008).

²⁸ BROWNMILLER, *supra* note 27, at 14-15. The vividness of this image should not be allowed to obscure its hypothetical status.

²⁹ *Id.* at 15; see also ANN J. CAHILL, *RETHINKING RAPE* 1 (2001) (explaining that "the threat of rape...constitutes a persistent and pervasive element in women's lives. . . . Rape," she continues, "has never been far from my experiences.").

³⁰ BROWNMILLER, *supra* note 27, at 15.

seems fair to say that American views of heterosexuality have been careening in the resulting turbulence ever since.

In the legal academic community, Harvard Law professor Catharine MacKinnon ran most aggressively with this message of male exploitation and female fear, producing a theory that came to be well-known as “Dominance Feminism.”³¹ In so doing, she set the agenda and tone for much contemporary feminist discourse, while famously—and much to her credit—paving the way for sexual harassment to be thought of as a form of sexual assault.³²

It should not be surprising, then, that MacKinnon, the towering figure in the field of sexual politics, seems to find nothing positive for women in sex itself. Nor have many other law academics, at least in print. Indeed, Professor Janet Halley announced twenty-five years later that she had “not found *anyone* determined to produce a theory of politics of *women’s heterosexual desire for masculinity in men*. It’s just missing.”³³ “How bizarre!” a proud and randy woman might well gasp. How to explain Halley’s finding? Can it be that acknowledgment of Saturday night fevers would vitiate the case against men? For if sex can bring relief, if it can actually be fun, then maybe women are not abused thereby.

Put otherwise, if women do not hunger for sex, if sex, that is, can only be imposed on them, sexual assault becomes easy to define. “Politically, I call it rape whenever a woman has sex and feels violated,” declared MacKinnon early in her career, in a statement less self-evident in its truth than may initially appear to be the case.³⁴ Why credit only women’s stated feelings about these instances and not those of men? Because men speak through their consuming sex drives, which vitiates their credibility.

To sum up, in MacKinnon’s world of Dominance Feminism we find no spontaneous and exuberant rolls in the hay for women. In this world, women fall prey to men’s systematic abuse of power,

³¹ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 32 (1987).

³² See Deborah Dinner, *A Firebrand Flickers*, *LEGAL AFFAIRS*, Mar.–Apr. 2006. See also CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN, A CASE OF SEX DISCRIMINATION* (1979).

³³ See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 65 (2006). “Leaving sex to the feminists is like letting your dog vacation at the taxidermist. 2 ALAN SOBLE, *SEX FROM PLATO TO PAGLIA: A PHILOSOPHICAL ENCYCLOPEDIA* 738 (2006) (quoting Paglia).

³⁴ MACKINNON, *supra* note 31, at 81–82.

because, starting with sex, underlying virtually all sex is a fundamental condition of inequality, and “inequalities are coercive conditions.”³⁵ In evaluating these inequalities, MacKinnon instructs us to make the assumption that “money functions as a form of force in sex”³⁶—as if women have not been rebuffing rich men as well as poor for millennia, as if Cinderella was no match for the prince. In our own time, we can note, even Hollywood kingmaker Harvey Weinstein had to struggle to find partners of his choosing.

GIVING AND GETTING

Also building the case against men by underscoring the oppressive side of sex—while ignoring any liberating side—was Georgetown Law professor Robin West.³⁷ For her, except perhaps in committed relationships, the woman defines herself as “as a being who ‘gives’ sex, so that she will not become a being *from whom sex is taken*.”³⁸ West reinforced her complaint this way: “[I]f a man wants sex and his female partner doesn’t, they will [copulate] more often will than won’t.”³⁹ But even if so, does the law need to step up to protect women from the alleged hedonic and bargaining inequality?

In explicit or implicit exchange for sex, one can ask, might not the woman be positioned to bargain for something she likes more than she dislikes sex and be happier as a result? Perhaps visiting her family rather than her mate’s at Christmas or sleeping late Sunday mornings while her mate walks her dog. In five words, nationally known literary critic Camille Paglia sought to solve the bargaining-

³⁵ CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 247 (2007).

³⁶ Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 448 (2016). Interesting perhaps to note, that unlike generations of parents who encouraged their daughters to marry well, MacKinnon seemed to be urging daughters *not* to consort with wealthier men since absent social and financial equality, which for MacKinnon is uncommon, there can be no meaningful sexual consent. *Id.* In this setting, women would generally experience sex as assaultive. *Id.* More important, can great beauty, charm, intelligence, music-making not also be a “form” of force? *See id.*

³⁷ West, *supra* note 10, at 165 (2000).

³⁸ *Id.* But even in these relationships women are put upon. “If what we need to do to survive, materially and psychically, is have heterosexual penetration . . . then we’ll do it, and . . . [w]e’ll report as pleasure what we feel as pain.” *Id.* at 214.

³⁹ Subotnik, *supra* note 27, at 850-51.

power issue: “We have what they want”⁴⁰; “Feminism, coveting social power, is blind to women’s cosmic sexual power.”⁴¹

Perhaps not just cosmically but also comically blind. “If there’s a man who might be up for having sex with you,” *Cosmopolitan* editor and “Sex and the Single Girl” author Helen Gurley Brown was *not* advising her young readers a decade later to call the cops, run away, or sue him as a harasser; rather, “take him to Gucci.”⁴²

We should not imagine that the dynamics of sexual interaction have changed over time. A few years after Gurley Brown weighed in, Northwestern University media studies professor Laura Kipnis responded sharply to the complaint that most women were suffering from unbearable sexual demands by their long-term mates: “Pricey dinners, diamond rings . . . in what other system of exchange can you trade exclusive access to an orifice for a suburban split level and a lifetime of money support?”⁴³ “Not such a bad deal,” she answered herself, “considering the backbreaking and alienated things people end up doing for money.”⁴⁴

Women’s sexual power has reportedly not waned since. “What many [feminists] don’t seem to see,” best-selling author Meghan Daum has recently noted, “are the countless ways that women frequently have power over men: in the use of sex as a tool for manipulation . . . in the ability nowadays to shut down a conversation by citing male privilege.”⁴⁵

MY SEX AND ME

Not all injury, of course, is compensable in money and power. For at least some feminists, coitus can be, above all, *amputative*,

⁴⁰ CAMILLE PAGLIA, *SEX, ART AND AMERICAN CULTURE* 62 (1992).

⁴¹ Camille Paglia, *Perspective Needed – Feminism’s Lie: Denying Reality About Sexual Power and Rape*, SEATTLE TIMES (Feb. 17, 1991), <https://archive.seattletimes.com/archive/?date=19910217&slug=1266788>.

⁴² MAUREEN DOWD, ARE MEN NECESSARY? 177 (2005) (quoting Helen Gurley Brown, *Don’t Give Up on Sex After 60*, NEWSWEEK, May 29, 2000, at 55).

⁴³ LAURA KIPNIS, *THE FEMALE THING: DIRT, ENVY, SEX, VULNERABILITY* 123 (2007).

⁴⁴ *Id.*

⁴⁵ MEGHAN DAUM, *THE PROBLEM WITH EVERYTHING: MY JOURNEY THROUGH THE NEW CULTURE WARS* 84 (2019).

which would tend to support coming down hard on women's sexual partners. "Sex is not something that I 'own' and can give away," explains professor of philosophy Ann Cahill, because "such a model of possession suggests that 'I' exist as myself separate from my sexuality."⁴⁶

We need to home in on this identity theory. If a woman's sex is indeed to be thought of as a limb, the law clearly makes it unalienable.⁴⁷ But even assuming for the moment that it is so to be treated, the alternative to bargaining need not be unwilling submission; it can also be withdrawal. No one is forcing Cahill to build an intimate personal life around a man, much less for Hilda to be in Harry's bedroom late at night, unless she has bold plans.⁴⁸ Given that most sexual assault is by men who are known to complainants (not by strangers), a stance of social distancing will often shield a woman from having to bargain—while also greatly lowering the rate of sexual assault.⁴⁹ To respond more conceptually to Cahill and also to help dial down the rhetoric, since a woman is likely to have multiple sex partners during her life, "giving" sex would not violate the law, as it more resembles a loan than a sale.

The central factual question, of course, is whether women *actually* have the proprietary feelings about their bodies that can serve as a foundation for law reform? Some may; Blasey Ford comes to mind. And yet, the sexual revolution has pushed hard in the opposite direction, i.e., to demolish views like Cahill's that the soul resides in the loins. Women like long-time Cosmopolitan editor-in-chief and Gucci shill Helen Gurley Brown were generals as well as

⁴⁶ ANN J. CAHILL, *RETHINKING RAPE* 183 (2001). Pointing out the effects of sexual assault is helpful, but one has to be careful. Paglia captures the downside. "The whole system [of feminist understanding] now is designed to make you feel that you are maimed and mutilated forever if . . . [sexual assault] happens." PAGLIA, *supra* note 40, at 63. Can such teaching be helpful to women in distress?

⁴⁷ 42 U.S.C. § 274e (2007).

⁴⁸ In other words, if most sexual assault is not by strangers (see next note), women will have some power to avoid men with sexual designs on them by not inviting them to their bedrooms.

⁴⁹ Seventy-eight percent of assaults are by people known to their victims, twenty-two percent are by strangers. U.S. DEP'T OF JUSTICE, NCJ 248471, *RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE-FEMALES, 1995-2013* at 7 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

front-line soldiers in that uprising.⁵⁰ It seems fair to conclude that today many, if not most, women lead their lives more à la Brown than à la Cahill. The resulting culture is drenched in sex. Women read, watch, circulate, and produce porn, which would make it hard to find agreement for regulating couplings, except, of course, where force is used, a matter that we will soon address. To nail the point down, in a hook-up culture that is well established, many young women today seem to view their sexual parts more as practical resources and less as holy relics.⁵¹

AMBIGUOUS CONSENT

Recognizing that risks of sex and double standards still at play contributed to frequent ambivalence about sex among women (to be discussed at some length below), reformers in the first decade of this century homed in on affirmative consent as a way to ensure that women truly wanted the sex that was being offered. Under the affirmative consent, the pursuer, usually presumed to be a male, must show that he has a clear signal to proceed. Ambiguous signals in this view do not count; consent must be “affirmatively displayed.”⁵² But how much active support among young women is there for affirmative consent? This author has yet to find a single study on the subject, and not for lack of trying. If we are to allow the long arm of the law to reach down into our sex lives, surely we need good surveys, not only philosophical ruminations.

The only relevant study cleverly, albeit obliquely, showed resistance to affirmative consent among women (and men). In the mid-1990s two women psychology professors surveyed male and female students to determine how they displayed their consent to

⁵⁰ See Maureen Dowd, *Men Might Be Able To Solve All Their Problems With A Little Blue Pill, But For Women, Things Are A Bit More Complicated*, GLOBE & MAIL (May 30, 2000), <https://www.theglobeandmail.com/arts/men-might-be-able-to-solve-all-their-problems-with-a-little-blue-pill-but-for-women-things-are-a-bit-more-complicated/article767974>.

⁵¹ Sex is a “female resource” for social exchange; male sex, by contrast has no “exchange value.” Roy F Baumeister & Kathleen D. Vohs, *Sexual Economics; Sex as Female Resource in Social Exchange in Heterosexual Interactions*, 8 PERSONALITY & SOC. PSYCHOL. REV. 339, 341-42 (2004).

⁵² 10 U.S.C. § 920(g)(7) (2019).

sex.⁵³ The choice for study subjects was Direct Verbal, Indirect Verbal, Direct Nonverbal, Indirect nonverbal, and None of the Above.⁵⁴ This last option received a strong plurality of the votes. Many of the interviewees were reluctant to communicate yes by word or deed. As the authors put it without explanation, students were “letting their partners undress them, not stopping them from kissing or touching them, not saying no.”⁵⁵ That is, any ambivalence about sex was resolved in part by not articulating to their partners the very thing they told the interviewer they were ready for: sex. Hardly affirmative support for affirmative consent, morally or legally. Should we be forcing such a policy on our students?

In light of the protean nature of desire, some academics nevertheless insist that those on the verge of sex first ascertain whether sufficient mutuality exists at the critical moment.⁵⁶ But is sex meant to be fundamentally discursive (words spoken out loud) or bodily (a mindful physicality)?⁵⁷ In their study of campus sex, two Columbia University researchers lament their findings on what “consent frequently looks . . . like” today [in text messages]: “U up?” “Yep.” “Can I come over?” “Sure.” “We have to do better,” conclude the authors.⁵⁸ But can we *really* do better? They might not consider it ideal, but students today, the study shows, *may* be looking less for a meeting of minds than one only of genitals.

EQUALITY FOR SOME

Some rape law reformers have used fear of sexually transmitted disease as a tool in their work, and at least one man is

⁵³ Susan E. Hickman & Charlene L. Muehlenhard, *By the Semi-Mystical Appearance of a Condom: How Young Women and Men Communicate Sexual Consent in Heterosexual Situations*, 36 J. SEX. RES. 258, 262-63 (1999).

⁵⁴ *Id.* at 264.

⁵⁵ *Id.* at 271. This begs the question: Why are women reluctant to say no? For a plausible answer, see *infra* notes 106–21 and accompanying text.

⁵⁶ See Baumeister & Vohs, *supra* note 51, at 346.

⁵⁷ Under a “negotiation” model, Professor Michelle Anderson proposes as a test for moral if not legal sex: Did a conversation occur that “request[ed]. . . information about another person’s desires and boundaries,” did it express “willingness to consider the other person’s inclinations and humanity[?]” See Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1423 (2005).

⁵⁸ JENNIFER S. HIRSCH & SHAMUS KHAN, *SEXUAL CITIZENS: A LANDMARK STUDY OF SEX, POWER, AND ASSAULT ON CAMPUS*, at X (2020).

involved in this effort. In 2005 Yale's Ian Ayres and Chicago Kent's Katherine Baker announced a far-reaching plan.⁵⁹ Concerned that seventeen and one-half percent of fifteen to forty-nine year-old men had genital herpes, that twenty-five percent of sexually active teenagers are beset by an STD, that only one percent of rape cases involve use of a condom, and that forty-six percent of an average woman's sex acts are with one-off partners, the authors proposed criminalizing first-time sex with a partner unless a condom is used or the woman gives explicit consent.⁶⁰ The penalty would be up to three months in prison.

If Ayres and Baker had stopped there, the proposal might have resonated. The problem is that the reformers exempted women from the reach of the proposed statute. Why the dispensation? Male-to-female transmission of STDs, they explained, is far higher than the reverse; in the case of HIV, it is up to twenty times as high.⁶¹ More important, if women are made accountable, they may not report the self-implicating criminal act.

But those explanations may hide the most fundamental motive for what some might imagine a constitutionally questionable proposal. If indeed it was to limit the transmission of STDs, would the better course of action be to include women in the targeted group? A woman would be less likely to engage in risky behavior if she put herself in legal as well as in biological jeopardy thereby. Additionally, she would be less likely to pass an STD to a man. This suggests that the reformers' goal may have been less to limit the incidence of sexual assault, as claimed, and more to hand the woman who had unprotected sex a cudgel to beat down the man.

RAPE HYSTERIA?

Brownmiller and MacKinnon would surely reject this image on a theory that women's exemption from charges of unprotected sex is likely far outweighed by benefits of underscoring the significant risk of being raped, through which, again, Brownmiller reported, "*all*

⁵⁹ See Ian Ayres and Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599 (2005).

⁶⁰ *Id.* at 604.

⁶¹ *Id.* at 605.

men keep *all* women in a state of fear.”⁶² This fear—like many of our other fears—could be deeply distressing, even debilitating. So how extensive is the fear? Extensive enough to justify radical change in patterns of current sexual engagement? Two early articles begin an answer, a 1985 piece (published shortly after Brownmiller’s book) concluding that the data did “not support the contention that the fear of rape is universal among women”⁶³ and a 1989 study holding that the fear “appears disproportionate to the actual risks women face.”⁶⁴

Recent quantitative research is more telling. According to Gallup in 2018, thirty-six percent of women reported experiencing fear of assault frequently or occasionally.⁶⁵ But that unsettling data point needs context. According to a concurrent Gallup report, seventy-one percent of men and women report occasional or frequent fear of losing a credit card or having financial information stolen by computer hackers.⁶⁶ Relatedly, sixty-seven percent of survey subjects, including men and women, report fear of identity theft.⁶⁷ Fear of sexual assault then is palpable, but if the more frequent fear of identity theft does not preclude most women from living their lives in relative peace, to what extent can the much less frequent fear of assault justify a regulatory reordering of our sex lives?

Two professors offered a provocative theory about the fear of rape when concluding that “the clustered perceptions women acquire about rape appear to have a self-fulfilling fear effect.”⁶⁸ Among the sources of those perceptions, the authors mention mass media and

⁶² See BROWNMILLER, *supra* note 27, at 15.

⁶³ Mark Warr, *Fear of Rape Among Urban Women*, 32 SOC. PROBS. 248, 248 (1985).

⁶⁴ MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 121 (1989).

⁶⁵ Justin McCarthy, *In Year Two of #MeToo, Fears About Sexual Assault Remain*, GALLUP (Nov. 12, 2018), <https://news.gallup.com/poll/244724/year-two-metoo-fears-sexual-assault-remain.aspx>.

⁶⁶ Megan Brenan, *Cybercrimes Remain Most Worrisome to Americans*, GALLUP (Nov. 9, 2018), <https://news.gallup.com/poll/244676/cybercrimes-remain-worrisome-americans.aspx>.

⁶⁷ *Id.*

⁶⁸ Douglas W. Pryor & Marion R. Hughes, *Fear of Rape Among College Women: A Social Psychological Analysis*, 28 VIOLENCE & VICTIMS 443, 461 (2013). Pryor and Hughes provide no contextual details.

parents.⁶⁹ Could Brownmiller, MacKinnon, West et al. be another source of the excessive fear?⁷⁰

In any case, the primary objective measure against which fear of rape needs to be evaluated is the frequency of rape. Barack Obama stunned the nation when in 2014 he reported that one in five undergraduates is sexually assaulted during her four college years, or very roughly—to keep the math simple—five percent per year.⁷¹ The political and social reverberations are still being felt.

A raft of reports came out at about the same time. In her 2016 book “Rape Culture Hysteria,” Wendy McElroy tried to make sense of the widely disparate results from these studies.⁷² Relying on the National Crime Victimization Study, published by the Bureau of Justice Statistics in December 2014, McElroy concludes that the rate of rape on campus is not approximately five percent, but less than one percent per year.⁷³ She goes on to admit that there is a five percent chance “that someone will try to fondle you or kiss you against your will or pester you into having sex.”⁷⁴ How harshly should the law deal with these transgressions? Surely it depends on the context. Few academics, however, have addressed the issue.⁷⁵

McElroy considers other assault reports deeply flawed because of low survey response rates, misleading questions, and overly broad definitions of sexual misconduct. Regretfully, attempting to reconcile the confounding differences found in the disparate studies is beyond the scope of this study.

⁶⁹ *Id.*

⁷⁰ See BROWNMILLER, *supra* note 27; see MACKINNON, *supra* note 35; see West, *supra* note 10.

⁷¹ Louis Jaconson, *Barack Obama Says Nearly Twenty Percent of Women in the U.S. Have Been Raped or Daced Rape Attempt*, POLITIFACT (Feb. 16, 2015), <https://www.politifact.com/factchecks/2015/feb/16/barack-obama/barack-obama-says-nearly-1-5-women-us-has-been-rap>; Office of the Press Secretary, *Remarks by the President and Vice President at an Event for the Council on Women and Girls*, WHITE HOUSE (Jan. 22, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/remarks-president-and-vice-president-event-council-women-and-girls>.

⁷² See MCELROY, *supra* note 1. For my 2017 review of this work, see Dan Subotnik, *Assaulting the Facts*, 30 ACAD. QUESTIONS 225 (2017).

⁷³ See MCELROY, *supra* note 1, at 157-59, 195.

⁷⁴ See MCELROY, *supra* note 1, at 195.

⁷⁵ An exception is Professor Joan Howarth. Howarth, *infra* note 106, at 725.

One line of relevant commentary, however, needs to be noted, a summary of which is provided by well-known journalist Cathy Young, who writes about sexual assault:

Three quarters of female students who were classified as victims of sexual assault by incapacitation did not believe that they had been raped; even when only incidents involving penetration were counted, nearly two-thirds did not call it rape. Two-thirds did not report the incident to the authorities because they didn't think the incidents were serious enough.⁷⁶

Whose measures of rape should be counted, the experts or the women in question?

Philosopher Alan Wertheimer, author of books and journal articles on ethics and sexual ethics, exfiltrated similar truths from assault complaints. Citing well-known 1970s feminist writer Robin Warshaw, he reported in his book "Consent to Sexual Relations" that only twenty-seven percent of date rape victims perceived themselves as such;⁷⁷ that fifty percent of those claiming they were "forced" into sex admitted that they were "in love" with their reputed victimizers; and that forty percent of such victims dated their attacker after the rape.⁷⁸ Of course, follow-up dates with an accused attacker do not disprove a sexual assault charge; such further connection may only reflect a woman's need to prove to herself that she was not assaulted, and that she was in control throughout. But will anyone argue that subsequent dates do not raise questions?

⁷⁶ Cathy Young, *The White House Overreaches on Campus Rape*, MINDING THE CAMPUS (Jan. 23, 2014), https://www.mindingthecampus.org/2014/01/23/the_white_house_overreaches_on. For more information regarding cases of unreported "sexual assaults," see HEATHER MACDONALD, *THE DIVERSITY DELUSION: HOW RACE AND GENDER PANDERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE* 120–21 (2018).

⁷⁷ ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 107 (2003).

⁷⁸ *Id.*

WHAT CLERY REPORTS TEACH

Further insight into the incidence of sexual violence can be gained through analysis of Clery data.⁷⁹ These are contained in (Clery) reports that the United States Department of Education (DoEd) requires colleges and universities to file annually on the amount of violence, both sexual and other, on campus.

To protect consumers of education, i.e., students, colleges and universities must also publicize the data on their websites or other prominent places. DoEd has adopted a uniform definition of sexual assault and requires colleges to train staffs to process complaints fairly.⁸⁰ Schools issuing misleading reports are threatened with loss of funding—almost surely a fatal result.

A newcomer to Clery data would expect that its results would match those of the Department of Justice and other large and well-financed studies.⁸¹ In fact, the average annual rate of college sexual assault for 2001-2012, as reported in 2015, was .0003, or .03%, or 3 out of 10,000.⁸² The University of Oklahoma reported thirty-six rapes for 2018 on a campus of 34,702 students, teachers and employees; that is 10.37 rapes for every 10,000 people.⁸³ Columbia University's Clery report, examined in 2019, showed the rate of misconduct to be as small as 3.5 rapes for every 10,000 students.⁸⁴

⁷⁹ Jeanne Clery, Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f).

⁸⁰ *Id.*

⁸¹ For information on such surveys, including Obama's source, see Glenn Kessler, *Obama's Claim That One in Five American Women Has Been a Victim of Rape or Attempted Rape*, WASH. POST (Feb. 12, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/02/12/obamas-claim-that-one-in-five-american-women-have-been-raped>.

⁸² See Corey Rayburn Yung, *Concealing Campus Sexual Assault; an Empirical Investigation*, 21 PSYCH. PUB. POL'Y & L., 1, 3–5 (2015).

⁸³ See *Sooner Safety and Fire Report*, UNIV. OKLA. (2020), <https://ou.edu/content/dam/OUPD/documents/safety.pdf>; *University of Oklahoma Enrollment Summary Report*, INST. RSCH. & REPORTING (Feb. 2018), https://www.ou.edu/content/dam/irr/docs/Enrollment%20Statistics/Enrollment%20Summaries/Spring/Spring_2018_Enrollment_Summary.pdf.

⁸⁴ See *2020 Annual Security and Fire Safety Report*, COLUM. UNIV. (2020), <http://publicsafety.columbia.edu/sites/default/files/content/SecurityReport2020.pdf>.

By contrast the “Obama” rate of approximately 5% is a full 174 times that of the national Clery average of .03%.⁸⁵

Fairness requires mention of at least two relevant studies holding that Clery numbers are unreliable.⁸⁶ It seems that university administrations like to tamp down bad news and, at the same time, students fear that any investigation would consume too much of their time and emotional resources. Yet, with dozens of people working in large university Title IX offices, surely including many women and with serious penalties for misleading reports, it seems inconceivable that universities could successfully implement the former type of conspiracy. The main point here is that there is no little confusion about the quantity of sexual assault on campus. Given the uncertainties, we should hesitate before stereotyping men as rapists and perhaps later denying individual men the ordinary protections of due process. We come to this issue now.

HARVARD WOMEN SPEAK

By 2017, one could have reasonably imagined that Brownmiller’s and MacKinnon’s influence would be waning after Harvard Law professors Elizabeth Bartholet, Nancy Gertner, Janet Halley, and Jeannie Suk Gersen (the Harvard Four)⁸⁷ published a manifesto opposing Harvard’s investigative policies.⁸⁸ Halley had provided a preview in 2015, when she wrote that the training program for investigators at Harvard is “100% aimed to convince them to believe complainants, precisely when they seem unreliable and

⁸⁵ *Id.*

⁸⁶ For information on such discrepancies see, e.g., *Climate Surveys Reveal Clery Report Discrepancies*, EVERFI, <https://everfi.com/insights/blog/climate-surveys-reveal-clery-report-discrepancies> (last visited Nov. 1, 2020); Kristin Lombardi, *Sexual Assault Statistics Don’t Add Up*, CTR. PUB. INTEGRITY (Dec. 2, 2009), <https://publicintegrity.org/education/campus-sexual-assault-statistics-dont-add-up>.

⁸⁷ My term.

⁸⁸ See Wesley Yang, *America’s New Sex Bureaucracy*, TABLET (Sept. 24, 2019), <https://www.tabletmag.com/jewish-arts-and-culture/291105/americas-new-sex-bureaucracy>. See also *Obama’s Mentor Joins Harvard Profs in Denouncing School’s New Sexual Harassment Policy*, WASH. EXAM’R (Oct. 15, 2014), <https://www.washingtonexaminer.com/obamas-mentor-joins-harvard-profs-in-denouncing-schools-new-sexual-harassment-policy>. Of the twenty-eight signatories, seven were women. *Id.*

incoherent.”⁸⁹ Since Harvard can hardly hold that a *coherent* account of sexual assault should be less presumptively credible, we have a case of heads the accuser wins, tails the accused loses.

In fact, the Harvard Four found that the proceedings they examined on campus were “overwhelmingly stacked against the accused,” so unfair, in fact, “as to be truly shocking.”⁹⁰ Schools, for example, were not letting accused students see complaints, or giving them access to evidence, including names of witnesses. Moreover, courts were overturning many college findings of male culpability.⁹¹

Equally stunning is how such stark conclusions were not leading to a major rethinking of process in sexual assault cases by mainstream feminists. Gersen gets at the core positional differences

⁸⁹ Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. FORUM 103, 110 (2015).

⁹⁰ Elizabeth Bartholet et al., *Fairness for All Students Under Title IX*, HARV. LIBR. OFF. FOR SCHOLARLY COMM’NS 1, 2 (Aug. 21, 2017), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:33789434>. While highlighting academic responses to sexual assault in this piece, I am mindful of engagement taking place outside of academia. As evidence, let me cite two campaigns that I have followed. The most important of these on one side is SAVE (Stop Abusive and Violent Environments), which decries Victim-centered and Trauma-centered investigations. See *Six Year Examination of Campus Jurisprudence Fails to Make the Grade*, STOP ABUSIVE & VIOLENT ENV’T (2017), <http://saveservices.ecotechservices.com/wp-content/uploads/Six-Year-Experiment-in-Campus-Jurisprudence.pdf>. On the other side is “Start by Believing” a program organized in 2011, a time when women’s complaints may not have been taken as seriously as they deserved to be, by End Violence Against Women International (EVAWI), whose goal was to train people to talk empathetically to sexual assault victims. See *Training Resources*, START BY BELIEVING, <https://www.startbybelieving.org/resources/#training> (last visited Nov. 1, 2020). For a rich account of the origins and much enlarged scope of the campaign known as Believe the Woman campaign, see *Believe the Victim: The Transformation of Justice*, STOP ABUSIVE & VIOLENT ENV’T (2018), <http://www.saveservices.org/wp-content/uploads/SAVE-Believe-the-Victim.pdf>. For a recent book-length analysis of campus sexual proceedings, see EVAN GERSTMANN, *CAMPUS SEXUAL ASSAULT: CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FAIRNESS* (2018).

⁹¹ See *Appellate Court Decisions for Allegations of Campus Sexual Misconduct, 2013-2018*, STOP ABUSIVE & VIOLENT ENV’T (2019), <http://www.saveservices.org/wp-content/uploads/Appellate-Court-Cases-Report.pdf> (pointing to investigative and hearing failures, among others, a study of federal and state decisions in due process cases rendered as of mid-2016 found that “judges ruled in favor of the accused student in thirty of fifty-one cases” brought by accused students).

in current rape discourse: “Lots of people disagree about where to draw the line. But most [laypeople] would want to draw the line so that there is such a thing as consensual sex.”⁹²

INCREDIBLE WOMEN

Towards the end of 2017, theories of women’s innocence, male predation, and the relative sexlessness of women came together in “Incredible Women,” an article by Northwestern Law School Professor Deborah Tuerkheimer.⁹³ In the context of widespread reported sexual misconduct—which helped bring on #MeToo—the author began by suggesting that, unlike in the case of other alleged crimes, police and prosecutors were not believing women, and that women’s complaints were languishing in files.⁹⁴ Moreover, women were doubting themselves or otherwise refusing to come forward, thus making it too easy for victimizers to victimize again.⁹⁵ Without acknowledging key psychological factors at play in sexual assault cases, Tuerkheimer’s simple message to decision-makers—a bold repudiation of due process—was to believe women when they charge assault.⁹⁶ With no *ifs* or *buts* provided by Deo, inculpation would mean culpability.⁹⁷

Others voiced similar opinions. Wanting to curb the misogyny she discerns in the administration of acquaintance-rape cases, Cornell law professor, Sherry Colb, argues that a rape charge “is an eyewitness account of a credible person. The denial of an accused rapist, by contrast, is entitled to little evidentiary weight as it

⁹² See Yang, *supra* note 88 (quoting Gersen).

⁹³ See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017).

⁹⁴ See *id.* at 56.

⁹⁵ *Id.* at 11.

⁹⁶ See generally *id.*

⁹⁷ Should we “believe” Mayella Ewell, the young white woman in “To Kill a Mockingbird” who falsely accuses a black man of rape? Or are black men, and only black men, exempt from Tuerkheimer’s prescription? HARPER LEE, *TO KILL A MOCKINGBIRD*, 251 (Grand Cent. Publ’g ed., 1988) (1960). For a comprehensive account of egregious errors in sexual assault cases, see MATTHEW BARRY JOHNSON, *WRONGFUL CONVICTION IN SEXUAL ASSAULT* (2020).

is explained by a desire to avoid conviction.”⁹⁸ This position might seem harsh to those with sons or brothers whom they might want to protect against unwarranted accusations. It is the broader legal ramifications of this position, however, that are most troubling. By this logic, all testimony of *all* defendants—male and female—could be largely ignored. A woman’s assault complaint would be more than enough to convict.

Can those who have fully lived life be confident that a woman’s testimony about sexual assault is trustworthy, while that of a man who contradicts her is not? Is Colb perched on a bridge too far? “I believe that women lie just as often as men do,” answers New York Times columnist and Pulitzer Prize winner Bret Stephens in the heat of #MeToo.⁹⁹ Though not a law professor, Stephens sounds like one: “I believe the standard ‘presumed innocent’ must always trump the slogan, ‘Believe Women,’ if we intend to live in a free and fair society.”¹⁰⁰

To some extent, surely, Tuerkheimer was on the mark. In view of the thousands of completed but unprocessed rape kits around the country, the authorities have not done enough.¹⁰¹ In discouraging, and perhaps prohibiting investigators from following up doubts *throughout* an investigation, however, she was blithely curtailing traditional due process rights of men. Query: if a non-negligible number of women suffer from some kind of self-deception, a topic we will come to,¹⁰² would not insisting on due process for men be critical?¹⁰³

⁹⁸ *Readers Respond to the 6.24.18 Issue*, N.Y. TIMES MAG. (July 5, 2019), <https://www.nytimes.com/2018/07/05/magazine/readers-respond-to-the-6-24-18-issue.html>.

⁹⁹ Bret Stephens, *This I Believe About Blasey v. Kavanaugh*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/opinion/blasey-kavanaugh-assault-allegations-truth.html>.

¹⁰⁰ *Id.*

¹⁰¹ Rape kits, to be sure, would not likely prove the crucial element of (lack of) consent.

¹⁰² See *infra* pp. 29-30.

¹⁰³ Certainly, it would have been for Benjamin Franklin who explained: “better that 100 guilty persons should escape than one innocent person should suffer.” ERIC STOVER ET AL., *SILENT WITNESS: FORENSIC DNA EVIDENCE IN CRIMINAL INVESTIGATIONS AND HUMANITARIAN DISASTERS* 34 (Eric Stover et al. eds., 2020) (quoting Franklin).

Undergirding Tuerkheimer's view, and strongly implied in her writing, is that a charge of sexual assault should be analogized to one of robbery. Since no one wants to be robbed, it seems fair to say, when a woman reports a robbery, listeners will tend to believe her. But readers may see that rape is fundamentally different from robbery in that it requires sex, which may well have—pace some female activists—been welcomed, indeed craved.

Wait! The reader will, rightly, interject here, what might a woman's libido have to do with a sexual assault claim? The woman in question will certainly not bring charges if she consented. She is too on to herself or too honor-bound; suggesting otherwise is rank sexism. In many cases yes. But what about the others?

A VIEW FROM THE TRENCHES

For this purpose, we need to get back to the Henry-Hilda story¹⁰⁴ that men and women purposefully fill up with drink, go to a party, pick someone up, get further soused with him or her, and make out. From this point, they invite or get invited to a dorm room, after which they disrobe and have sex.¹⁰⁵

Does it overtax the imagination to consider that, later, the woman might bring a sexual assault charge against the man? Help in resolving the seeming paradox is provided by Professor Joan Howarth, committed feminist and former law dean at Michigan State, who for years adjudicated sexual assault proceedings on campus.

Writing in 2017—more than fifty years after the first sparks of the sexual revolution—Howarth relates that when she began her adjudicatory work she had expected to find women's "widespread comfort with sexuality and confidence in seeking sexual pleasure."¹⁰⁶ This perception was perhaps founded on T.V. and movie presentations of sexual behavior. What she discovered in the sexual assault files instead were "seemingly bottomless pits of shame about sexuality."¹⁰⁷ Likely arising from guilt, this shame would explain

¹⁰⁴ See discussion *supra* p. 7.

¹⁰⁵ See generally Anne Groggel et al., *She Left the Party: College Students' Meanings of Sexual Consent*, SAGE J. (June 2018) (discussing variants of this situation).

¹⁰⁶ Joan W. Howarth, *Shame Agent*, 66 J. LEGAL EDUC. 717, 727 (2017).

¹⁰⁷ *Id.* at 721.

why many young people who willingly have sex are nevertheless unwilling to say “yes.”¹⁰⁸

More specifically, Howarth’s Title IX field experience taught her that “*many* highly accomplished women students suffer from sexual identities that are painfully constrained [and] fearful.”¹⁰⁹ The shame and fear were pushing them towards Title IX offices. How? As a result of feeling that sex is owed to their pursuers in today’s free-wheeling campus hook-up culture, Howarth writes, a number of “women experience very little control or autonomy over their own sexuality, [which] can lead to the enforcement regime being activated to vindicate honor, provide safety from a third party [i.e., boyfriend], reinforce identities of sexual innocence, protect against jealousy, or protect young women from falling from someone’s grace.”¹¹⁰ To deny having consented can be useful as “a safety net to catch someone from falling from ‘good’ to ‘slut.’”¹¹¹ By contrast, “[t]o not be considered a slut, a disloyal girlfriend or fiancée or a ‘tease,’” Howarth sums up, “can be very important, perhaps crucial, to a young woman’s identity and well-being.”¹¹²

Reporting specifically on the sources of her own ambivalence, New York Times Gender Editor Jessica Bennett has explained why, at the age of nineteen, she had unforced but far less than ideal sex with an acquaintance twelve years older.¹¹³ The sex, she claimed, arose out of “fear (that I wasn’t as mature as he thought), shame (that I had let it get this far), and guilt (would I hurt his feelings?).”¹¹⁴

While sexual shame can easily lead to underreporting of assault, Howarth goes on to explain, some women may have a “deep self-interest to . . . diminish any role in suggesting consent” when

¹⁰⁸ See Hickman & Muehlenhard, *supra* note 53, at 59.

¹⁰⁹ See Howarth, *supra* note 106, at 726 (emphasis added).

¹¹⁰ Howarth, *supra* note 106, at 722. As for women’s felt lack of control over sex, Katherine Baker writes that the “emotional complexity of sex” often leaves women ambivalent about whether to proceed, because they “tend and befriend,” and thus may “yield rather than resist.” Katherine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J. L. & GENDER 447, 449, 458 (2005).

¹¹¹ Howarth, *supra* note 106, at 722.

¹¹² *Id.* at 731.

¹¹³ See Jessica Bennett, *When Saying ‘Yes’ is Easier than Saying ‘No’*, N.Y. TIMES (Dec. 17, 2016), <https://www.nytimes.com/2017/12/16/sunday-review/when-saying-yes-is-easier-than-saying-no.html>.

¹¹⁴ *Id.*

making claims.¹¹⁵ They may “have complicated pressures to exaggerate the harm that they suffered, substitute certainty for uncertainty about exactly what happened, or pursue serious penalties for conduct that may not be considered serious by others. Unpleasant and unwelcome as this reality may be,” she adds, “we should recognize it,”¹¹⁶ because as a matter of personal—as opposed to social justice — “‘we believe you’ does not translate fairly into individual adjudications.”¹¹⁷ Believing women, that is, can be a trap for a fair-minded adjudicator.

This author has found no other women adjudicators who speak of the psychological underpinnings of women’s sexual assault claims.¹¹⁸ Howarth’s solo standing in this matter, however, should not undermine confidence in her findings; after all, calling into question some women’s reliability as complainants and witnesses would undermine, just to start with, the professed goal of one feminist leader who comes to the academic table “not to deliver the truth but to inspire social change” i.e., to increase women’s power.¹¹⁹

Such a risk may explain why feminist writers stay away from women’s sexual insecurity. It is one thing if women’s relative weakness arises out of men’s muscle and financial power. However, if it is sexual ambivalence that stands in the way of women’s well-being, how can men be largely responsible? Since it is also possible that women may not know their own sexual minds, this cannot help but, among other things, raise the troubling question of whether there might be other decisions that women are not well-positioned to make.

THE ENEMY WITHIN

If female Title IX adjudicators have neither corroborated nor refuted Howarth’s findings, at least one man has, Brett Sokolow, President of ATIXA (the Association of Title IX Administrators, with 3,600 members across the country), expert witness in over fifty

¹¹⁵ See Howarth, *supra* note 106, at 731.

¹¹⁶ *Id.* at 730.

¹¹⁷ *Id.* at 731.

¹¹⁸ Not surprising, universities seem routinely to forbid Title IX staff members from communicating with outsiders about their work. Police leaders are no different. I speak with experience here. Title IX procedures are a black hole.

¹¹⁹ See WILLIAMS, *supra* note 12, at 244.

lawsuits, and a well-published author on Title IX.¹²⁰ What stands out in his experience are young women's lack of resilience, absence of coping skills, and susceptibility to mental-health crises, resulting from compulsive sharing of stories by a number of women

empowered by . . . [survivor] groups who are going around claiming victimization for something they absolutely *believe* happened, for which they *are* experiencing trauma, [and yet] did not occur—because they don't have contact with reality the way the rest of us do. I wish I could figure out why that's happening . . . but it is happening a ton.¹²¹

A harsh judgment to be sure; which makes it even more unfortunate that we do not hear from other adjudicators about their experience in the trenches.

Horwath and Sokolow, it should be clear, are speaking not only about false rape reports, i.e., complaints that are known to be false, but also, and more important, about confusion over the elements of sexual assault.¹²² To the extent that they are right, assessing complainant credibility needs “a ton” more attention than it has been given.

The foregoing authors' experience helps explain why, in relation to the number of sexual assault complaints, relatively few college men are found culpable.¹²³ Their observation at the same time suggests that men in these cases—though surely not to the same extent as women—have been victims too, hence the need for robust due process. Put otherwise, Horwath and Sokolow would want readers to consider that complainants might indeed have shown what many men and women would understand as consent.

THE HELPFULNESS OF HELPLESSNESS

If feminist activists seek greater power for their sisters, how to explain Janet Halley's finding fifteen years ago, for which

¹²⁰ See *Leadership*, ASS'N TITLE IX ADM'RS, <https://www.atixa.org/about/our-team> (last visited Nov. 1, 2020).

¹²¹ VANESSA GRIGORIADIS, *BLURRED LINES RETHINKING SEX, POWER & CONSENT ON CAMPUS* 184 (2017) (quoting Sokolow).

¹²² *Id.* at 128; see Horwath, *supra* note 106.

¹²³ See, e.g., Yung, *supra* note 68 and accompanying text.

considerable evidence has already been presented, that feminists have “a *profound* commitment to an understanding of themselves as utterly without power”?¹²⁴ A presumption of powerlessness, it turns out, can be expedient. It can, for example, bolster the claim that to protect women, law schools badly need more women faculty, more women deans, higher women’s salaries, and correspondingly faster and more reliable promotions to tenure; but how many more women is sufficient, and at whose expense?

Women of course should be treated even-handedly. But others may deserve jobs and higher salaries too based on their achievements. Most will agree that women faculty have had a harder time than men in our academic history. But does it beggar belief that ambitious women, however much marginalized, might take *undue* advantage of newly acquired influence wherever they can?

Over twenty years ago, surely with women activists in mind, among others, Black Harvard Law professor Randall Kennedy warned that unless inhibited,

every person and group will tend toward beliefs and practices that are self-aggrandizing. This is [not only] true of those who inherit a dominant status . . . Surely one of the most striking features of human dynamics is the alacrity with which those who have been oppressed will oppress whomever they can once the opportunity presents itself.¹²⁵

What this means practically, especially now, thirty years later, is that “it is not premature to worry about the possibility that . . . historically subordinated groups will abuse power to the detriment of others.”¹²⁶ One need not believe that all interest is self-interest to know that some is.

Bret Stephens explains how groups now press for influence in the culture wars; “the quickest way to acquire and exercise power is to take offense.”¹²⁷ Offense at what or whom? Perhaps at the simple suggestion that women should control their drinking because more

¹²⁴ See HALLEY, *supra* note 33, at 14 (emphasis added).

¹²⁵ Randall Kennedy, *My Race Problem*, ATL. MONTHLY (May 1997), <https://www.theatlantic.com/magazine/archive/1997/05/my-race-problem/376849>

¹²⁶ *Id.*

¹²⁷ Bret Stephens, *Dear Millennials, The Feeling Is Mutual*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/opinion/biden-2020-millennials.html>.

than forty percent “of sexual assault events involve alcohol consumption by the victim.”¹²⁸ Should such a suggestion be condemned for blaming the victim? Kipnis mocks such a self-exculpating feminist ploy in her riff: “[w]omen don’t drink; men get them drunk.”¹²⁹ (Or, as the comedian Flip Wilson’s character Geraldine used to say, “The devil made me do it!”).

TAKING THE RED PILL

Besides teaching young women and men about the need for forethought and self-restraint, a prescription that is front and center of “Sexual Citizens,”¹³⁰ good pedagogy requires instruction on what can happen when a man not implausibly claims that he had consent, when there are no physical injuries or witnesses, and when, without coercion, the woman placed herself in a position that offered a reasonable expectation or at least hope of further intimacies.

One need not go all the way with Paglia that accompanying a man to a bedroom during a boozy fraternity party is “consenting to sex.”¹³¹ For example, it can hardly be oppressive for the law to respond to a complainant in the following manner: you seem honest and well-balanced, you have the right to change your mind *at any time*, you might well have been the victim of a sexual assault and having to relive that experience may be searing, especially when you have to face your victimizer and complete strangers; but because (1) the accused not incredibly avers that he had consent; (2) for all the denials, pace MacKinnon, women in fact often want sex and indeed “*frequently get drunk in order to have sex*,”¹³² (3) no one forced you

¹²⁸ According to one report, forty-three percent of “sexual assault events” are linked to alcohol use by the victim. *Sexual Assaults on College Campuses Involving Alcohol*, American Addiction Centers (May 8, 2020), <https://www.alcohol.org/effects/sexual-assault-college-campus>. See Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, J. OF STUD. ON ALCOHOL & DRUGS (Jan. 2015) <https://doi.org/10.15288/jsas.2002.s14.118>.

¹²⁹ LAURA KIPNIS, UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS 205 (2017).

¹³⁰ See HIRSCH & KHAN, *supra* note 58.

¹³¹ See DAUM, *supra* note 45, at 177 (quoting Paglia).

¹³² HIRSCH & KHAN, *supra* note 58, at 81 and accompanying text (italics in original).

into the dorm room of the accused, your actions at the time displayed intimate interest in the man, and specifically, while kissing per se does not amount to consent to intercourse, it may not be unconnected to it;¹³³ and (4) you have provided no evidence, direct or indirect, of your non-consent—say, through witnesses or, indirectly, through similar charges by other women against the accused—we cannot find blameworthiness beyond a reasonable doubt, or even by clear and convincing evidence.

That assaults are greatly underreported to police is not relevant in any particular case. We destroy any chance of personal and communal well-being if we do not reject MacKinnon's touchstone for political and moral equity: "I call it rape whenever a woman has sex and feels violated."¹³⁴ Feeling violated, Howarth has implied, must not be the test.¹³⁵

WHAT IS TO BE DONE?

How do we set rules that come down hard on sexual misconduct and at the same time allow space for healthy sex to flourish? As to misconduct, we can start by holding erstwhile culture heroes, like Harvey Weinstein, to strict account for browbeating unwilling women into submission, while trying to persuade them that they really are consenting; this behavior is unconscionable.¹³⁶ The law cannot protect men who are beholden to their tumescence; they need and must be given what Gustave Flaubert famously called a "sentimental education."¹³⁷

At the same time, we must support the almost entirely unheralded, but no less important, message that women need a

¹³³ The French lexicon makes the point best. The same word has both meanings: *Baiser* as a noun denotes kissing but as a verb denotes copulation.

¹³⁴ See MACKINNON, *supra* note 31, at 82.

¹³⁵ Howarth, *supra* note 106, at 731.

¹³⁶ Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein scandal: A complete list of the 87 accusers*, U.S.A. TODAY (Oct. 27, 2017), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001>.

¹³⁷ See GUSTAVE FLAUBERT, *SENTIMENTAL EDUCATION* (Penguin Classics ed., 2004) (1869). According to at least one report, sixty-nine percent of "sexual assault events" are linked to alcohol use by the perpetrator. See American Addiction Centers, *supra* note 128.

sentimental education too, especially on the need to assume responsibility for their libidinal selves.¹³⁸ In such a setting, among other things, we could look forward to fewer claims from women like Bennett that they did not really want to do it, that they did it out of “fear (that I wasn’t as mature as he thought); shame (that I had let it get this far); and guilt (would I hurt his feelings?).”¹³⁹ Instead, if they had post-coital regrets, future Bennetts would admit: “regretfully, I badly needed it”; “I hadn’t been touched by a man in a long time”; and “my friends were all enthusiastically doing it while feeling sorry for me or poking fun at me for being alone. I just felt left out.” It should be noted here that even in her own account the New York Times Gender Columnist makes no reference to fear of violence.

No one will doubt that, especially in the contemporary environment, calls on men from any corner to exercise a high standard of civility and constraint in their own sexual behavior are appropriate and necessary. By contrast, experience teaches that at least some readers will think it insensitive and intrusive for a man to call on a woman to own her own sexuality, not least because this can come at a considerable personal price. As Kipnis readily admits, “Sexual honesty, about women as desiring beings, making our own sexual choices (sometimes even terrible ones), can be painful.”¹⁴⁰ Katherine Angel has succinctly identified the sources of this pain: slut-shaming, harassment, cultural proscriptions, and “susceptibility to male violence.”¹⁴¹ In this setting, “How can we know what we want,” she ruefully asks, “when knowing what we want is both demanded of us and a source of punishment,”¹⁴² “when knowing one’s own mind is such an undependable aim,”¹⁴³ and when having to articulate it nevertheless is “oppressive[?]”¹⁴⁴

¹³⁸ See Kipnis, *supra* note 129.

¹³⁹ See Bennett, *supra* note 113 and accompanying text. For a poignant but powerful message that women must learn how to say no, see Melissa Febos, *I Spent My Life Consenting to Touch I didn't Want*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/magazine/consent.html>.

¹⁴⁰ See KIPNIS, *supra* note 129, at 96.

¹⁴¹ See KATHERINE ANGEL, SEX WILL BE GOOD AGAIN 65 (2021).

¹⁴² *Id.* at 5.

¹⁴³ *Id.* at 39-40.

¹⁴⁴ *Id.* at 15. Was Kipnis borrowing from feminist groundbreaker Mary Wollstonecraft?: “I do not wish them [women] to have power over men, but over themselves.”

Insights such as these, while intriguing, have failed to persuade Kipnis, who urges women to fully accept their sexuality; and not only for the obvious reason of having more satisfying sex.¹⁴⁵ In the absence of women's sexual honesty with themselves, she warns, "no sexual equality is ever going to be possible [in any realm.]"¹⁴⁶ Can she be wrong?

If we continue to hold, like Angel, that a woman cannot fully consent, no sex act will be deemed morally and legal safe and, one might add, we will continue to have the same desultory conversations with the same old and sad complaints. Are we prepared to live indefinitely in a world where there can be no knowable moral or legal consent? Recognizing sexual drives and admitting to sexual intent, on the other hand, should lead to less *shesplaining* about women's sexual innocence and fewer demands, however tantalizing, that Harry—and only Harry—be thrown out of school for drunk sex with Hilda at the end-of-finals bash.¹⁴⁷

Writ large, when women continue to blame men for their own unhappiness, Kipnis adds (speaking as perhaps no woman law professor ever has), fair-minded observers lose focus. Women's "preoccupation has been in getting society to change . . . and getting men to change," when, in truth, the underlying problem is that women "tend to overvalue men and male attention in ways that make us stupid and self-abnegating," and that what women need now are "prolonged bouts of self-reflection."¹⁴⁸

That the law cannot readily free women from the burden of self-reflection should be clear—unless, that is, we can successfully raise the age of consent to, say, thirty years, or deal with the sex-

¹⁴⁵ See KIPNIS, *supra* note 129.

¹⁴⁶ *Id.* at 96. Was Kipnis borrowing from feminist groundbreaker Mary Wollstonecraft?: "I do not wish them [women] to have power over men, but over themselves." *Backlash over nude memorial to British feminist icon Wollstonecraft*, GLOB. TIMES (Nov. 11, 2020), <https://www.globaltimes.cn/content/1206517.shtml>.

¹⁴⁷ For a theory of why the blame should be usually placed on men for drunken sex, see HIRSCH & KAHN, *supra* note 58, at 143. The author of a new treatise on sex, however, shows no enthusiasm for this proposition. STUART GREEN, *CRIMINALIZING SEX* 151–54 (2020).

¹⁴⁸ KIPNIS, *supra* note 129, at 217–18. Such self-study should help women deal with feelings that they are sexually innocent or that sex is owed to the man. *Id.*

alcohol link, neither of which seems likely.¹⁴⁹ Amidst our drunken and reluctant sex, then, and in the absence of the soul-searching, there will be no let-up in distressing accounts such as Bennett's, or worse, in stomach-turning accounts of young women who go to bed with men largely out of fear of being dumped only to find themselves dumped just the same.¹⁵⁰ In the end, then, are we not in a situation where, as Pogo's twin sister might have said, "We have met the enemy, and she is us"?¹⁵¹

CONCLUSION

The drive for power that may have led some feminists to excess should not obscure other contributing factors. Arthur Koestler helps to identify one of them: "If power corrupts," the famed mid-twentieth-century novelist and essayist suggested, "the reverse is also true; persecution corrupts the victims, though perhaps in subtler and more tragic ways."¹⁵² How, exactly? By encouraging us to give in to feelings of hurt, and oppression, thereby preventing us from fairly assessing and then improving our condition? But why should women invite feelings of oppression? Koestler doesn't say. The great Russian novelist Dostoyevsky begins an answer: "The deeper the grief," he taught, "the closer is God!"¹⁵³

Why? Perhaps because, as some Christian saints have done, we can train ourselves to see pain not as evidence of bad luck,

¹⁴⁹ Katherine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J. L. & GENDER 447, 449, 458 (2005).

¹⁵⁰ HIRSCH & KHAN, *supra* note 58, at 17.

¹⁵¹ Walt Kelly, *We Have Met the Enemy and He is Us*, OHIO STATE UNIV. LIBR. (April 22, 1970), <https://library.osu.edu/site/40stories/2020/01/05/we-have-met-the-enemy>. Walt Kelly's "We Have Met The Enemy and He Is Us" appeared in his famous Pogo poster for the first Earth Day, April 22, 1970. *Id.*

¹⁵² SLAVOJ ZIZEK, VIOLENCE: SIX SIDEWAYS REFLECTIONS 121 (2008) (quoting Koestler).

¹⁵³ See Ariel Levy, *A World Without Pain*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/13/a-world-without-pain> (quoting Dostoyevsky). It seems to also bring us, in ways we have seen here, to communion with our fellow human beings. See Vivian Gornick, *Why Some of Us Thrive in a Crisis*, ATLANTIC (June 2020), <https://www.theatlantic.com/magazine/archive/2020/06/the-fellowship-of-suffering/610492>. The "Elect" are destined for Salvation. *Id.*

behavior, or planning, but as a sign of cosmic significance; that would explain all those frightening yet uplifting medieval accounts of self-mortification in print and in art.¹⁵⁴ Specifically, in this view, our suffering connects us to the Divine and allows us to absorb life's deepest meanings. Women as saints? Not fantasy, according to a leading scholar of our language, rhetoric, and culture wars. Mistrustful of what we might call holy-culture-warriors, John H. McWhorter has recently, with no little irony, situated them next to God by labeling them "[t]he [i.e., God's] Elect."¹⁵⁵

The sacralization of pain does not of course mean that claims of injury, being specious, can be ignored; it means, rather, that our stories, both men's and women's, must be interrogated. It is not enough in this view to Talk Truth to Power; the "powerless" need to hear truth too.

In a similar way, Koestler and Dostoyevsky can help us understand the self-righteousness in the discourse examined here and salient in much other discourse on sex.¹⁵⁶ Since God is in my corner, I must be right. It should be clear what we need now is conversation flowing from the widest range of hearts and minds.

To the extent that dissenting male voices today are absent from legal discussions of sexual behavior, the silence is surely due also to a toxic idea, rooted in our fractious and identarian academic world, that any outsider who challenges my group's self-conception, one that lies at the core of my identity, in this case my sexuality, must

¹⁵⁴ See AUTOBIOGRAPHY OF ST IGNATIUS OF LOYOLA.

¹⁵⁵ See John McWhorter, *The Elect: The Threat to a Progressive American from Anti-Black Antiracists*, IT BEARS MENTIONING (Mar. 9, 2021), <https://johnmcwhorter.substack.com/p/the-elect-the-threat-to-a-progressive-755>. McWhorter is a professor of English at Columbia University, who does not limit "elect" status to those writing and speaking on racism.

¹⁵⁶ See Wells, *supra* note 2, at 1387 (reporting that she no longer thinks about "whether [she] *should* be offended: Instead, [she] . . . know[s] that [she is] offended [and this gives her] a sense of wholeness."). This leads to what may be a useful thought experiment: Could an offended male scholar conceivably try to make a serious point by reference to his feelings of wholeness? Wells is supporting a longstanding stereotype: "We think of law as rational, objective, abstract, logical/analytical, and rigorous. These are the characteristics more often attributed to men than to women. Women are often seen as the mirror opposite: as irrational, subjective, contextual, intuitive, flexible, and compassionate." Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 349 (1996).

hate me. But does women's vulnerability in the sexual domain extend to vulnerability to *discourse* on sex? Is talk violence? Are legal scholars so insecure that dissenting opinion must be dismissed as hateful and harmful? The link can be explored. Did Justices Scalia and Ginsburg regularly socialize at the opera only *in spite* of their jurisprudential conflicts?¹⁵⁷ Criticism is not odium.

In the fissiparous world we live in, we should now be able to see that feminism needs the diversity of men's input, confirmatory or critical, to truly succeed. Asking men to suppress their own voices does not promote respect for women or, by extension, get us all where we need to go.¹⁵⁸ Rather than "shutting down . . . conversation[s] by citing male privilege"—which Meghan Daum charges feminists with doing¹⁵⁹—law professor Nancy Levit, author of a primer on law and feminism, urges women to "try to foster men's interest in writing about gender issues and [in] interpreting, adopting, expanding on, and *reacting to* feminist ideals and methodologies,"¹⁶⁰ all of which are goals of this essay.

In other words, less sisterhood and more siblinghood are called for now. If we can give up the untamed energy that comes from having a clearly identified all-powerful enemy, if we can talk openly to one other, scholars holding differing positions on feminist issues might find common ground. By tamping down our dudgeon, in short, we might all enjoy some gender peace.

¹⁵⁷ Richard Wolf, *Opera, travel, food, law: The unlikely friendship of Ruth Bader Ginsburg and Antonin Scalia*, U.S.A. TODAY (Sep. 20, 2020), <https://www.usatoday.com/story/news/politics/2020/09/20/supreme-friends-ruth-bader-ginsburg-and-antonin-scalia/5844533002>.

¹⁵⁸ West, *supra* note 10, at 154. Women must "give voice to the hurting self," urged Robin West in 2000, "even when that hurting self sounds like a child rather than an adult; even when that hurting self-voices 'trivial' complaints." *Id.* Would a self-possessed man have allowed that assertion to go unanswered? And might not his response have helped feminist opinion to get back on track?

¹⁵⁹ See DAUM, *supra* note 45 and accompanying text.

¹⁶⁰ NANCY LEVIT, *THE GENDER LINE; MEN, WOMEN, AND THE LAW* 224 (1998) (emphasis added).